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## SUBJECT INDEX.

## AUTHORITIES.

**Cases Cited:**

Authorities Cited—*Continued.*

In The

SUPREME COURT OF THE UNITED STATES

October, 1947, Term.

No. 606

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GEORGE M. ILLGES and LOUISE HAMM, Administratrix of the Estate of John Hamm, Deceased,

Petitioners,

vs.

J. E. CONGDON, Jr.,

Respondent.

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# Brief of Respondent in Opposition to Petition for Writ of Certiorari to Review State Court Judgment.

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This is an application for a writ of certiorari directed to the Circuit Court of Walworth County, Wisconsin, to review a judgment of that Court entered November 3, 1947.

The Circuit Court is a trial court of general jurisdiction. The Supreme Court is an appellate court and the highest court of the state.

The judgment if the Circuit Court was entered following the decision of the Supreme Court of Wisconsin filed June 10, 1947, which modified and affirmed a previous judgment of the trial court.

## Statement of the Case.

This was an action for damages for breach of contract brought by Petitioner, George M. Illges, in the Circuit Court for Walworth County against the respondent, J. E. Congdon, Jr. John Hamm was interpleaded as a defendant. He died during the course of the trial and the petitioner, Louise Hamm, was substituted as administratrix of his estate.

The action involved a contract for the cutting of timber. The respondent, J. E. Congdon, Jr., owned the timber. Hamm was to cut and process the same and Illges was to do the selling and furnish the finances.

As a result of the first trial a judgment was entered February 20, 1945, adjudging that respondent Congdon had breached the contract and awarding damages to petitioners Illges and Hamm.

On appeal this judgment was reversed by the Supreme Court of Wisconsin on December 4, 1945. This case is reported in 248 Wis. 85. By this decision the Supreme Court ruled that the contract had been breached by Illges and Hamm and remanded the cause to the trial court for further proceedings in accordance with its opinion.

Further proceedings were had in the trial court and the trial court made new and additional findings of fact and conclusions of law and entered judgment thereon.

Thereafter the respondent Congdon appealed to the Supreme Court and the petitioners Illges and Hamm pursuant to state statute sought a review of various questions adjudicated by the trial court deemed to be adverse to them.

The Supreme Court by decision filed June 10, 1947, and reported in 251 Wis. 50, 27 N. W. Reporter 2nd, 716 modified the judgment of the trial court, and affirmed the same as so modified. The case was then remanded to the trial court and further proceedings were had resulting in

a final judgment dated November 3, 1947 (R. 1210), which judgment is sought to be reviewed in this court by this petition. Thereafter judgments were docketed in favor of petitioners against respondent, the judgments have been paid and have been satisfied pursuant to State Law. (R. 1227)

Attention is called to a collateral proceeding not here involved, wherein the petitioner Illges sought by an original mandamus proceeding in the Supreme Court of Wisconsin to compel the trial judge to enter a judgment following the first decision by the State Supreme Court, different than that entered by the trial court. This case is entitled *State ex rel. Illges vs. Kopp* and was decided February 25, 1947, and is reported in 250 Wis. 32.

The Court there determined that the issues determined by the Circuit Court in the course of subsequent proceedings after filing of the mandate by the Supreme Court following the first appeal could not be reviewed or modified by mandamus, and that such matters could only be considered on a second appeal. It also determined that relator's contention regarding Supreme Court consideration of evidence, raised no question under either the State or Federal Constitution.

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## Statement as to Jurisdiction.

Petitioners' application for writ of certiorari is pursuant to Section 237(b) of the Judicial Code as amended, 28 U. S. C. A. 344(b). No state statute is involved and the application is predicated on that clause of the Judicial Code providing, "or where any title, right, privilege, or immunity is specially set up or claimed by either party, under the constitution, or under any treaty or statute

of, or commission held or authority exercised under the United States; * * * "

It is to be noted that the application is not directed to the final judgment of the Supreme Court of Wisconsin filed June 10, 1947, but rather to the judgment of the Circuit Court for Walworth County entered November 3, 1947, and which it is claimed became final November 14, 1947. It is the claim of petitioners that the modifications of the judgment of the Supreme Court dated June 10, 1947, were not of a ministerial nature but rather required the exercise of judicial functions and hence that a final judgment was not entered until November 3, 1947.

No appeal was taken by the petitioners or the respondent from the judgment of the Circuit Court entered November 3, 1947.

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## Questions Involved.

Questions involved are:

1. Did the Supreme Court of Wisconsin make findings of fact in excess of its power?
2. If so, did this result in taking petitioners' property without due process of law in violation of Federal Constitution?
3. Was any right, privilege or immunity "specially set up or claimed" by either party under the Federal Constitution or under any treaty or statute thereof?
4. Is the judgment of the Circuit Court for Walworth County entered November 3, 1947, a final judgment or decree of the highest court of the state?

5. Does the petition present a substantial Federal question?

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## Summary of Argument.

1.

The Wisconsin Supreme Court did not make findings of fact. The Court merely held, contrary to the conclusions of the trial court, that the admitted breaches of the contract found by the trial court, were important and went to the heart of the contract and entitled respondent to terminate the same.

2.

Even if the Supreme Court of Wisconsin did make findings of fact in excess of its power this would be a violation of the State Constitution and a state statute and is a matter of local concern and would not raise any Federal question.

3.

Petitioner has not "specially set up or claimed" any title, right, privilege or immunity and the petition is devoid of any such showing. This is a statutory requirement for jurisdiction of this court and without it petition should be denied.

4.

The judgment of the Circuit Court for Walworth County is not a final judgment or decree of the highest court of the state. The petitioner contends that on remittitur from the Supreme Court on the second appeal that judicial

functions were required to be exercised by the trial court to comply with the Supreme Court's decision modifying the trial court's former decree and that the function of the trial court required judicial discretion and was not ministerial. If so, then an appeal would again lie to the Supreme Court and therefore the decision here in question is not a decision of the highest court of the state.

If, on the contrary, the functions to be performed by the trial court were ministerial in character, then this petition comes too late since it should have been filed within 90 days from June 10, 1947, the date of the Supreme Court decision.

5.

No substantial Federal question is presented by the record.

(a).

No Federal question was passed on.

The only place where the record discloses an attempt to raise a Federal question was in a collateral original proceeding in mandamus in the State Supreme Court which is not a part of this record. Even in that case the court held relator raised no constitutional question and that he had mistaken his remedy.

(b).

The question at best is one of State Court procedure which does not raise a Federal question.

(c).

The question is one of local law and raises no Federal question.

(d).

The question involved is one of fact and raises no Federal question.

(e).

The judgment sought to be reviewed has been paid and satisfied and the case is closed and the question is moot.

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## Argument.

### 1.

### The Supreme Court of Wisconsin did not make findings of fact.

Petitioners based their whole claim upon the proposition that the Supreme Court of Wisconsin is an appellate court without power under the State Constitution to make findings of fact and that it did so in violation thereof, resulting in a reversal of the trial court judgment on the first appeal.

It is true that the Supreme Court of Wisconsin, so far as is here material, is a court of review only, under Article 7, Section 3 of the Wisconsin Constitution, and under Section 251.08 of the Wisconsin Statutes.

It is not true that the Supreme Court made findings of fact.

The findings of fact alleged to have been made by the Supreme Court of Wisconsin by the petitioners are contained in the decision on the first appeal, *Illges vs. Congdon*, 248 Wis. 85, decided December 4, 1945.

The trial court had held in its fourth findings of fact set forth in full on pages 91 and 92 of that decision, that a contract existed between the petitioners and respondent in connection with a logging venture, and that the

respondent had breached the contract. The trial court had held that the disputes over the conduct of the operation and various alleged breaches of the contract by petitioners did not go to the heart of the contract and was purely a question of accounting.

On the appeal the Supreme Court of Wisconsin determined that various breaches of the contract by the petitioners did go to the heart of the contract and was a basis for the cancellation of the contract by the respondent Congdon, and the decision of the trial court was reversed and the cause remanded for further proceedings.

The facts which led the Supreme Court to this decision were not in dispute.

The Supreme Court in its decision says:

> "Under the terms of the contract as found by the trial court, there were no expenses for which Illges was entitled to reimbursement from the proceeds of the lumber sold. Paragraph 6(a) of the findings refers especially to dry-kiln installation, which they agreed not to install, or to expenses other than the cost of production or sale. As the lumber was sold, Congdon was to receive $15 per thousand board feet, which was the first money to be paid from receipts. In place of Congdon's receiving this money, it was used for expenses of operation by Hamm and Illges. Likewise Congdon was to receive one-half of the slabs, which it appears he intended to use for firewood. Hamm, in violation of the contract, sold the slab wood and converted the money to his own use for operating expense. Hamm paid to himself seventy-five cents per hour, contrary to the terms of the contract as found by the court. This was a joint enterprise and no one had any right to appropriate the receipts to his own use. The only way the purpose

of the contract could be carried out was for the receipts to be placed in a general fund and disbursed in accordance with the terms of the contract, which was $15 per thousand board feet to Congdon for timber, and $30 per thousand board feet to Illges and Hamm thereafter for the expense of logging, manufacture of lumber, and sale of the lumber, any balance to be paid one-third to each. It was the duty of Hamm and Illges to arrange their own finances if any additional money was needed. This money was to be provided by Illges and not from the joint funds. Payments were due to Congdon immediately when the lumber was sold and money received in payment for it."

The Court further says:

"To permit respondents to carry on under what was in effect the making of a new contract and disburse all of the receipts for their own purpose would be such a breach so substantial as to defeat the very object of the contract * * * The conduct of respondents was not a technical or unimportant breach or failure of performance due to mere inadvertence, but was an attempt on the part of respondents to enforce the terms of a new contract which had never been agreed to or entered into between the parties. It was a deliberate violation of the terms of the contract and respondents, by their conduct, renunciated the contract as found by the court."

*Illges vs. Congdon,* 248 Wis. 85.

It is also to be noted that the Court points out in its opinion that petitioners first pleaded one contract and thereafter served an amended complaint alleging an entirely different contract.

Surely if an appellate court is to have any supervision by a review of a trial court it must have the power to determine whether the findings of the lower court and the admitted facts warrant the conclusion reached by the trial court, and as to whether those facts and alleged breaches go to the heart of the contract or are merely incidental to a question of accounting and unimportant.

There is no dispute that as the lumber was sold Congdon was to receive $15 per thousand from the first receipts, and there is no dispute that in place of Congdon receiving this money it was used for expenses of operation by Hamm and Illges. The contract as found by the trial court provided that Congdon was to receive one-half of the slabs. There is no dispute that Hamm in violation of contract sold the slab wood and converted the money to his own use for operating expense. There is no dispute that Hamm paid himself seventy-five cents per hour contrary to the terms of the contract as found by the trial court. The contract was breached in other respects by Hamm and Illges, but the trial court was of the view that they were not so important or material as to permit Congdon to cancel the contract. The Supreme Court held the legal effect to be otherwise.

This does not constitute a finding of fact by the Supreme Court. The entire premise upon which petitioners base their case is therefore false.

Furthermore we point out that the trial court did in fact make different and additional findings of fact and conclusions of law following remittitur after the first appeal. See pages 6 and 7 of petition. That these findings were made as a result of suggestions or directions by the Supreme Court is quite immaterial. The fact is that they were made and that they are findings of the trial court. The findings do support the judgment that was entered and petitioner is in no position to claim that there are no

findings or admitted facts to support the second judgment of the trial court. The argument that the Supreme Court made the findings of fact is therefore untenable.

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## 2.

### Even if the Supreme Court of Wisconsin did make findings of fact in excess of its power this would be a violation of the State Constitution and would not raise any Federal question.

It is important to bear in mind that there is no state statute or section of the State Constitution which petitioners claim to be invalid. It is merely their contention that the act of the Supreme Court has been such as to violate the state statute or the State Constitution.

As to questions under a state statute pertaining to procedure or as to the jurisdiction of a state court, that is to say, whether or not it has appellate or original jurisdiction, the decision of the State Supreme Court is final and no Federal question is involved.

> "Where a state law is admitted to be valid, and the only question is whether it has been correctly construed, the Supreme Court has no jurisdiction. *Commercial Bank vs. Buckingham* (Ohio, 1847), 5 How. 317, 12 L. Ed. 169; *Scott vs. Jones* (Mich., 1847), 5 How. 343, 12 L. Ed. 181; *Smith vs. Hunter* (Ohio, 1849), 7 How. 738, 12 L. Ed. 894; *Lessieur vs. Price* (Mo., 1851), 12 How. 59, 13 L. Ed. 893; *Congdon, etc., Min. Co. vs. Goodman* (Tenn., 1862), 2 Black, 574, 17 L. Ed. 257."

> "A decision of the state court resting upon the construction and not upon the validity of a statute of the state does not present a federal question.

*Grand Gulf R., etc., Co. vs. Marshall* (La., 1851), 12 How. 165, 13 L. Ed. 938; *Ferry vs. King County* (Wash., 1891), 141 U. S. 668, 12 S. Ct. 128, 35 L. Ed. 895; *Snell vs. Chicago* (Ill., 1894), 152 U. S. 191, 14 S. Ct. 489, 38 L. Ed. 408."

Likewise as to whether or not the State Constitution has been violated by the Supreme Court in determining a matter of its jurisdiction or whether that jurisdiction has been properly exercised is likewise a matter for final determination by the State Court and no Federal question is involved.

For instance, in some respects the Supreme Court of Wisconsin does have original jurisdiction. Whether that jurisdiction has been properly exercised is purely a State Court matter. Again in several states the Supreme Courts do have power to make findings of fact and conclusions of law, or in other words, exercise original jurisdiction. This is no concern of the Federal government and raises no question under the Federal Constitution.

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## 3.

## No title, right, privilege or immunity is set up or claimed.

This Court's jurisdiction is statutory and petitioners must qualify under Section 237(b) of the Judicial Code, 28 U. S. C. A. 344(b). They can only hope to qualify under the clause pertaining to the title, right, privilege or immunity under the Federal Constitution or any treaty or statute or commission. To do so the right or privilege must be "specially set up or claimed."

Nowhere in the pleadings is this alleged right or privilege specially set up or claimed. Nowhere does it appear

in the petition that the question was raised in either the trial court or in the Supreme Court. The only statement that the question was ever raised is contained in an unsupported statement in counsel's brief which is not a part of the petition.

In this regard it is important to bear in mind that the decision of the Wisconsin Supreme Court on the mandamus action where counsel for petitioner sought to raise the question here intended for review, *State ex rel. Illges vs. Kopp,* 250 Wis. 32 decided February 25, 1947, is not a part of the record or in any way involved in this case. That was an original proceeding in the Supreme Court, is collateral to this action, and the record is in that court, and is not a part of the record in this case. In this connection we call attention to the fact that petitioners have failed to comply with paragraph 1 of Rule 12 of this Court in that they have failed to specify the stage in the proceedings in the court of first instance, and in the appellate court, and the manner in which, the Federal questions sought to be reviewed were raised; the method of raising them and the way in which they were passed upon by the court with specific reference to the places and the record where the matter appears as will support the assertion that the rulings raised a Federal question. Nowhere in the petition do we find such information.

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**4.**

**The judgment of the Circuit Court for Walworth County is not a final judgment or decree of the highest Court of the State.**

The decision by the Supreme Court of Wisconsin on the second appeal was made June 10, 1947, *Illges vs. Congdon,* 251 Wis. 50, 27 N. W. 2nd 716. This decision modified

the trial court's second judgment and affirmed the judgment as so modified and the case was remanded for further proceedings. Petitioners in their brief at page 26 state:

> "The second appeal modified the judgment and required substantial reconsideration and modifications to the findings of fact, conclusions of law and judgment previously entered. These modifications were not of a ministerial nature. The rights of the parties to the assets of the joint enterprise had not been determined finally and completely pursuant to the mandate of the court from the first appeal. In lieu of nominal damages allowed to the respondent in the judgment as entered, no damages were allowed in the final judgment. After sale of the assets, the court reserved the right and power on motion to determine the several amounts due the several parties. In the order amending the judgment dated November 3, 1947 (R. 1210), the court expressly reserved and precluded the issuance of execution until the further order of the court. These functions are judicial in nature requiring judicial discretion, judgment and power and not ministerial acts of a purely clerical nature."

If petitioners be correct in this statement, and if the trial court thereafter performed various judicial functions, which it unquestionably did, then this decision was not a final decision for an appeal from the decision of the trial court resulting from the performance of these judicial functions would lie to the Wisconsin Supreme Court. It is immaterial that the Wisconsin Supreme Court would undoubtedly affirm on the basis of previous decisions. Petitioners would be obliged to take that appeal in order to have the decision of the highest court of the state so as

to meet the statutory requirement for the jurisdiction of this court.

*Great Western Tel. vs. Burnham,* 162 U. S. 339, 16 S. Ct. 850, 40 L. Ed. 991.

If, on the other hand, the duties to be performed by the trial court after the decision by the Supreme Court on the second appeal, were ministerial in nature only, then this petition comes too late, since it should have been filed under the statute within 90 days from June 10, 1947.

Such appears to be the dilemma facing petitioners on their own statement.

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## 5.

## No substantial Federal question is presented by the Record.

In addition to the reasons heretofore advanced it is submitted that for several reasons no substantial Federal question is presented and that the matter is of purely state concern.

### *(a)*

### *Federal Question Not Passed on.*

An examination of both decisions of the Wisconsin Supreme Court on the appeals involving the matter here at issue, *Illges vs. Congdon,* 248 Wis. 85 and *Illges vs. Congdon,* 251 Wis. 50, 27 N. W. 2nd 716, fails to disclose that any Federal question was discussed or passed on, nor that any such question was presented, nor that the judgment could not have been given without deciding such Federal question.

This is a jurisdictional requirement in this court. See numerous cases cited in Note 49, Title 28 U. S. C. A., page 231, under paragraph 344, Section 237 of the Judicial Code, as amended. In this connection we call the Court's attention to the fact that it is only in the collateral proceeding in the mandamus action where petitioner sought to raise this Federal question. That was an original proceeding in State Supreme Court to compel the trial court to enter a judgment different than that entered by the trial court following the first decision by the State Supreme Court. This case was decided February 25, 1947 and is entitled *State ex rel Illges vs. Kopp* and is reported in 250 Wis. 32.

That decision is not a part of this record and it was there decided that not only did the relator raise no constitutional question, but that he had mistaken his remedy.

*(b)*

*Question of State Procedure Does Not Raise Federal Question.*

Petitioners contend that the Supreme Court of Wisconsin made findings of fact. If we assume for the purposes of argument that this be true, it at most involves a question of procedure. A decision of a state court resting on grounds of state procedure does not present a Federal question. See numerous cases cited in Note 81 to paragraph 344 under Section 237 of the Judicial Code as amended, 28 U. S. C. A., page 251.

*(c)*

*Question Is One of Local Law and Raises No Federal Question.*

The decisions here involved determine laws of the State of Wisconsin applicable to a state of facts pertaining to

a contract. Such decisions of state courts based on local laws not involving constitutional questions are not subject to review by this court.

See Note 71 to paragraph 344 under Section 237 of the Judicial Code as amended, 28 U. S. C. A., page 242.

*(d)*

*Question Involved Is One of Fact and Raises No Federal Question.*

The decision by the Supreme Court of Wisconsin involved a question of fact and the law applicable thereto. The facts which the Supreme Court used as a basis for determining that the contract had been breached by petitioners and that respondent had a right to terminate the same were not in dispute. Among other things it was not disputed (1) that in place of paying Congdon from the first receipts $15 per thousand board feet that this money was used for expenses of operation by Hamm and Illges; (2) that Congdon was to receive one-half of the slabs, but that Hamm sold the slab wood and converted the money for his own use for operating expense, and (3) that Hamm paid himself seventy-five cents per hour contrary to the terms of the contract as found by the trial court.

These are questions with which this court does not concern itself as this court does not grant certiorari to review evidence and to discuss specific facts.

*U. S. vs. Johnston,* 268 U. S. 220, 45 S. Ct. 496, 69 L. Ed. 925.

*(e)*

*Judgment Sought to Be Reviewed Has Been Paid and Satisfied and Case Is Closed.*

The judgment entered by the Circuit Court for Walworth County on November 3, 1947, provided for the payment of certain sums by respondent to petitioners. (R. 1203 and 1211) These amounts have been paid to petitioners and the judgment has been satisfied pursuant to state law. (R. 1220, 1224 and 1227) It is the contention of respondent that acceptance of the benefit of the judgment by petitioners, even if with reservations, and the satisfaction of that judgment by the Clerk pursuant to Section 270.93, Wisconsin Statutes, terminated this litigation and leaves questions to be decided on this application moot.

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## Conclusion.

We call attention to the fact that petitioners' complaint is against the ruling of the first decision of the Wisconsin Supreme Court reported in 248 Wis. 85 and decided December 4, 1945. The petition is not to review that decision. The trial court following that decision did make findings of fact and conclusions of law which do support the judgment as finally entered and these findings are based upon the evidence and upon the pleadings and the admitted facts. Petitioners first pleaded one contract and then by an amended complaint pleaded an entirely different contract. The contract as found by the trial court was breached in several respects by petitioners which the trial court first concluded "that none of the reasons assigned by the respondent in justification of his termination of the contract went to the heart of the contract

or constituted a material breach thereof by petitioners." (See page 4 of petition, and 248 Wis. 85 at page 93.) The Supreme Court decided that the breach by petitioners was wilful, important and went to the heart of the contract and warranted Congdon in terminating the same. See *Illges vs. Congdon,* 248 Wis. 85 at 95a. This is purely a question of law and a matter of interpretation which is singularly within the province of the State Court.

For the reason that petitioners' major premise, namely, that the Supreme Court of Wisconsin made findings of fact in excess of its powers, is wrong and that even if correct, no Federal question is raised, because the record does not show that petitioners "specially set up or claimed" the right sought to be reviewed, because either the judgment is not that of the highest court of the state or the application is not timely, and because no substantial Federal question is raised, and for the reasons heretofore urged respondent submits that the application for the writ of certiorari should be denied.

Respectfully submitted,

ARTHUR T. THORSON,
Counsel for Respondent,
Elkhorn, Wisconsin.

## Motion of Respondent to Return Original Record to Circuit Court of Walworth County, Wisconsin.

Now comes the respondent and upon the annexed affidavit of Arthur T. Thorson and upon the records and files herein moves the Court to return the original record to the Clerk of the Circuit Court of Walworth County, Wisconsin, with leave to the appellant to cause a transcript thereof to be certified by said clerk and filed with this Court.

## Argument on Motion.

By mistake, the Clerk of the Circuit Court for Walworth County, Wisconsin, by direction of one of the counsel for petitioners, forwarded to this Court the original record rather than a transcript thereof as required by the rules.

Respondent's present counsel did not represent him in the trial court and it is necessary that he have access to the original record to be able to prepare a defense to this petition. He is not able to determine whether petitioners' designation of parts of the record to be printed are adequate.

The respondent has, therefore, moved that the original record be returned with leave to petitioners to cause a transcript thereof to be certified by the Clerk and filed with this Court. That respondent urges consideration of this motion only in the event that the application for the writ is not denied upon its merits.

## Argument on Motion of Petitioners to Dispense With Printing Record or Alternative to Limit Parts to Be Printed.

For the reasons immediately previously stated with respect to the motion to return the original record we must oppose petitioners' application to dispense with printing of the record in the event that the petition for the writ be not denied upon its merits.

Without a printed record counsel for respondent is unable to prepare a defense to the petition.

It is obvious that a large part of the record deals with extraneous matters and need not be printed, and the respondent is willing to cooperate with the petitioners to determine by stipulation the portions to be printed, but without access to the original record is not able to determine whether the parts of the record suggested to be printed by the petitioner are adequate.

At the very minimum the parts of the record designated by the petitioner to be printed should be printed. This also is urged only in the event that the petition for the writ is not denied on its merits.

Respectfully submitted,

ARTHUR T. THORSON,
Counsel for Respondent,
Elkhorn, Wisconsin.